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February 13, 1992

The Honorable Dan Morales  
Attorney General of Texas  
Post Office Box 12548  
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Opinion Committee

Dear General Morales:

This is to request your official opinion on the issue of adjustments to the rate of the assessment imposed under the Public Utility Regulatory Act (PURA), article 1446c, Texas Civil Statutes.

Section 78 of the PURA imposes an assessment of one-sixth of one percent of gross receipts of utility companies "for the purpose of defraying the costs and expenses incurred in the administration of this Act" by the Public Utility Commission. It also provides that "Thereafter, the commission shall, subject to the approval of the Legislature, adjust this assessment to provide a level of income sufficient to fund the commission and the office of public utility counsel."

The rate of the assessment has never been changed, either by statute or by commission action, since the PURA was adopted in 1975.<sup>1</sup> The

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<sup>1</sup> The Public Utility Regulatory Act was adopted by Acts of 1975, 64th Legislature, ch. 721, effective September 1, 1975.

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reference to "defraying...costs and expenses" has remained unchanged since the original enactment, except that in 1983 the reference to providing funding for the office of public utility counsel was added.<sup>2</sup>

The Public Utility Commission recently proposed two rules relating to adjustments to the rate of the assessment. These proposals form the basis for my inquiry.

Substantive Rule 23.5 would require utilities to separately identify the rate of the assessment being collected from ratepayers, and to adjust their rates to reflect any changes in the assessment.<sup>3</sup> Under another proposed rule, the commission will "enter an order setting the level" of the assessment after the legislature sets the commission's budget and that of the Office of Public Utility Counsel. In effect, the rate of the assessment would be adjusted to track the amount of these appropriations. <sup>4</sup>

The rule further provides that the commission "may" adopt an order adjusting the assessment as a result of action by the legislature or the Governor which changed the budget of the commission and the Office of Public Utility Counsel by more than 25%. In each case the chairman of the commission would "send a copy" of the order to the comptroller.

The commission has now acted to reduce the rate of the assessment from 1/6 of 1 % to 1/16 of 1 %. The effective date specified for

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<sup>2</sup> See Acts of 1983, 68th Legislature, p 1318, ch. 274.

<sup>3</sup> 16 Tex. Admin. Code Sec. 23.5, Public Utility Commission Assessment, was proposed in the October 18, 1991, edition of the Texas Register, at 16 Tex. Reg. 5762.

<sup>4</sup> 16 Tex. Admin. Code Sec. 21.182, Setting of Utility Assessment, was proposed in the October 25 edition of the Texas Register, at 16 Tex. Reg. 5941.

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this change is 180 days after it is filed with the Secretary of State. I do not know whether that has yet been done.

To the best of my knowledge, these rules are the first action of any kind by the commission in connection with evaluating the sufficiency of the revenue generated by the assessment, or with considering an adjustment of the rate.

**1. My first question is whether the procedure followed by the commission as discussed above satisfies the requirement of Section 78 that any adjustment is to be made "subject to the approval of the Legislature?"**

Section 316.045, Government Code, prescribes a procedure to be followed by agencies that set fees in order to cover the costs of agency operations. These agencies are directed to review their fees before each fiscal biennium, and include the results of that review in their budget proposals.

If the fee generates more revenue than is needed to cover agency costs, the agency is directed to reduce the fee appropriately, and to "charge the reduced fees during the subsequent biennium."

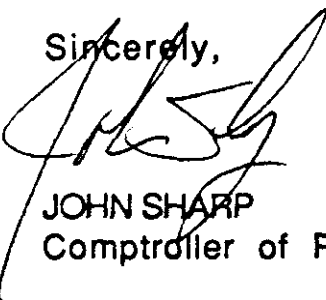
The provisions dealing with the imposition, collection, due dates, delinquency and other administrative aspects of this levy are found in Sections 78, 79, and 80 of the PURA. The terms "assessment" and "fee" are used interchangeably.

**2. My second question is this: Is the fee in question here subject to the provisions of Section 316.045, and if so, does the proposal for adjusting its rate comply with the requirements of that provision?**

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I will appreciate your prompt attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Sharp', is written over the printed name and title.

JOHN SHARP  
Comptroller of Public Accounts